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IN THE

Supreme Court of the United States

October Term, 1943

No. 33

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF OF PETITIONER.

M. J. DOHERTY,
W. E. RUMBLE,
Saint Paul, Minnesota,
Attorneys for Petitioner.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Saint Paul, Minnesota,
Of Counsel.

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BRIEF OF PETITIONER.

GROUND OF JURISDICTION.

The jurisdiction of the Court is invoked on the ground that the tax sought to be recovered in the action was levied and assessed in violation of petitioner's rights under the Constitution of the United States, and particularly under Section 1 of the Fourteenth Amendment and Section 8 of

Article I. Jurisdiction in such case is conferred by Section 237(b) of the Judicial Code (28 U. S. C. A., Sec. 344) authorizing a review by this Court:

> "Where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States."

STATEMENT OF THE CASE.

This is an action by the State of Minnesota to recover from Northwest Airlines, Inc. (a Minnesota corporation) the amount of an alleged delinquent personal property tax assessed against the Airlines for the year 1939. The tax was upon the entire fleet of airplanes owned and operated by the Airlines in interstate transportation of persons and property. The route over which the planes are operated is between Chicago and Seattle and Portland, with a connecting line between Fargo, North Dakota, and Winnipeg, Canada. On its Chicago-Pacific Coast route the Airlines serves seven states, in the course of which it makes regular scheduled landings in seventeen cities, two of which are in Minnesota. The total length of route in May, 1939, was 2,466 miles, of which 320.2 miles, or fourteen per cent, were in Minnesota. The daily plane mileage was 14,414, of which 2,348.4, or sixteen per cent, were in Minnesota. At seven of its landing points the Airlines operates hangars and business offices, two of which (at Chicago and Fargo) it owns. Five are leased. At the other ten landing points it leases office and other space for its business headquarters and activities. At each point it has a station manager, radio operator, and other employees. On its Chicago-Pacific Coast route

there are four flight crew bases, representing the termini of flight crew divisions, where the crews begin and end their runs and make their headquarters. Fargo to Winnipeg is one division. Also there are six so-called maintenance bases, one of which is at Minneapolis. Five are in states other than Minnesota. At these bases are maintained completely manned and equipped service stations for the repair and maintenance of planes. At Saint Paul there is maintained a service station for major overhaul and repair work (5-15).* No particular airplanes are allotted to any route or section. All are operated interchangeably over the whole system (7, 12). The result is that while no specific planes can be allocated to any state, a proportion of the entire fleet is capable of being so allocated on a plane mileage, route mileage, or similar basis.

On both routes the Airlines' planes, as a matter of practical operation, are obliged to and do follow approximately fixed courses of travel. This is made necessary by the regular landing points, by the radio range courses operated by the Civil Aeronautics Authority, and by the regular series of emergency landing fields also maintained by the Authority (7, 12). The Airlines operates under a certificate of convenience and necessity issued by the Civil Aeronautics Board, which fixes both its terminal points and all intermediate stops (8, 13). Its course is prescribed, and the law permits neither deviation nor abandonment.

All of the Airlines planes were from time to time during the year 1939 in Minnesota. On May 1 (date as of which tax liability is determined) of that year a portion only of the fleet was in the State, and the presence of only a very few planes continued during the entire day (7-8, 12-13).

*Figures in parentheses refer to page numbers of the Record.

The case was submitted to the trial court—District Court of Ramsey County, Minnesota—on a stipulation of facts, which appears at pages 5 to 10 of the record, and upon this stipulation the Court made its findings, which appear at pages 10 to 16 of the record.

The action was contested by the Airlines on the ground that the levy and assessment of the tax was in violation of the commerce, due process, and equal protection clauses of the Federal Constitution and also of certain provisions of the Constitution of Minnesota. The District Court overruled the objections, held the assessment valid, and rendered judgment in favor of the State and against the Airlines for the sum of $18,266.68. Upon appeal to the Supreme Court of Minnesota, this judgment was affirmed by a divided court, the chief justice and two associate justices dissenting. The constitutional objections were raised by answer in the District Court (3-4) and by brief and oral argument in the Supreme Court. A copy of the opinions (majority and minority) of the Supreme Court of Minnesota is found in the printed record at pages 17 to 39, inclusive. The decision is reported in 213 Minn. 395 and 7 N. W. (2d) 691.

ASSIGNMENTS OF ERROR.

The Supreme Court of Minnesota erred:

1. In affirming the judgment of the District Court of Ramsey County, Minnesota.

2. In holding the tax valid.

3. In holding that petitioner's entire fleet of airplanes had a taxable situs in Minnesota.

4. In holding that any given portion of petitioner's airplanes might have a tax situs in more than one state.

5. In holding that the tax was not in violation of Section 8 of Article I of the Constitution of the United States and in refusing to hold the contrary.

6. In holding that the tax was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States and in refusing to hold the contrary.

QUESTIONS PRESENTED.

The ultimate questions presented are whether the enforcement of the tax as levied would deprive the Airlines of its property without due process of law or deny it the equal protection of the laws, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, or would place an unlawful burden on interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States.

SUMMARY OF ARGUMENT.

Minnesota is without jurisdiction to tax the entire fleet of the Airlines' planes on a full *ad valorem* basis. It can, within its constitutional power, tax only that proportion of the fleet which is regularly and habitually used in the state. A corresponding right is enjoyed and is in fact exercised by each of the other states through which the planes operate, and the authority in such other states to tax proportions of the fleet is incompatible with authority in Minnesota to tax the whole.*

The tax situs of tangible property is controlled by its "permanent" physical situs. Such property can have but one situs. This is subject, however, to the rule that different *proportions* of the same aggregate of items of tangible personal property may under certain circumstances have different situses, although each *proportion* can have but one. The familiar example is railroad rolling stock used in interstate transportation operations. Such property may be taxed by each state through which it passes only on a proportionate basis, and is not taxable in its entirety by any state. Habitual presence and use of a *proportion* of such property in any state gives that proportion a "permanent" situs in such state within the rule governing the power to tax. The rule of the rolling stock cases should be applied to commercial airplanes operated in interstate flights. Since a *proportion* of the Airlines' fleet of planes had acquired situs and was taxable and taxed in states other than Minnesota, only the remaining portion was subject to tax in the latter state. The proportion or propor-

*The Airlines route crosses the northern extremity of Idaho, but it makes no landing in that state and has not been taxed there.

tions having situs and being subject to tax in other states are beyond Minnesota's jurisdiction.

The taxation by a state of property beyond its jurisdiction constitutes the deprivation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment. If (as in this case) the property so taxed be employed in interstate commerce, there is also a violation of the commerce clause of Article I. Aside from the strict question of jurisdiction, multiple taxation of the instruments of interstate commerce constitute such a burden on that commerce as to infringe the commerce clause.

ARGUMENT.

The Taxing Statute and the Tax.

Minnesota has a taxing statute broad enough to authorize the tax if it be valid according to its literal terms. Section 272.01, *Minnesota Statutes*, 1941 (Section 1974, Mason's Minnesota Statutes, 1927) reads as follows:

> "All real and personal property in this state and all personal property of persons residing therein, including the property of corporations, * * * is taxable * * *."

Literally read, this statute would be clearly unconstitutional as authorizing the taxation of all personal property owned by residents, even though physically and permanently located elsewhere and beyond the State's jurisdiction. However, in the tax proceeding it did not appear that the right to tax was predicated upon this statute. It does now so appear from the State's brief. Regardless of any apparent statutory authority, the enforcement of the tax would violate the Airlines' constitutional rights.

I.

The Tax Violates the Due Process Clause of the Fourteenth Amendment.

It is axiomatic that a state's power of taxation is limited by its territorial jurisdiction and is confined to property having a situs therein. Situs of tangible personal property, like that of land, is physical. Permanent physical situs and tax situs coincide. Domicile of the owner determines the situs of such property only when physical situs elsewhere does not appear.

ROLLING STOCK CASES.

The problem of tangible personal property habitually moving through and between states and not resting permanently in any was presented in the railroad rolling stock cases. Situs was attributed to *proportions* of such property rather than to individual items. Accordingly, the power to tax was apportioned on an average basis, each state being permitted to tax only the proportion of the rolling stock or equipment habitually employed in the state and being denied the right to tax such property in its entirety. Various formulae devised by state taxing authorities reasonably calculated to accomplish apportionment were approved. Some were condemned. *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *American Refrigerator Transit Company v. Hall*, 174 U. S. 70; *Union Refrigerator Transit Company v. Lynch*, 177 U. S. 149; *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194; *Union Tank*

Line Company v. Wright, 249 U. S. 275; *Pullman Company v. Richardson*, 261 U. S. 330; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158. The rule could be stated in broader terms, but the foregoing covers the case.

In *Johnson Oil Refining Co. v. Oklahoma*, supra, the facts were that the Refining Company, an Illinois corporation, operated a refinery in Pawnee County, Oklahoma, from which it shipped oil in its own tank cars into many states. A tax laid by Oklahoma on the entire fleet of cars was held to be in violation of the due process clause of the Fourteenth Amendment. This Court said:

> "When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

In *Union Refrigerator Transit Company v. Kentucky*, supra, an attempt was made by the State of Kentucky to tax in its entirety an aggregate of railroad cars owned by the Transit Company, a Kentucky corporation, portions of which were habitually used in other states by shipper lessees. This tax was also held to be in violation of the Fourteenth Amendment. As illustrating the rule of apportionment which must be applied in such cases, the Court said, referring to its previous decision in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18:

> "We have also held that, if a corporation be engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run."

In *American Refrigerator Transit Co. v. Hall,* supra, this Court sustained a tax by the State of Colorado based upon the average number of the Refrigerator Company's cars employed in the state during the period in question, with this comment:

> "We think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

The facts of these cases are indistinguishable in principle from those in the case at bar, and the rule there established should be applied here. There is nothing in the nature, function or manner of operation of airplanes that sets them apart from railroad cars, so far as the necessity and propriety of the rule of apportionment is concerned. There is the same movement of transportation equipment through and between states over fixed routes of travel, the same continuous process of change in the individual items present in each state according to the requirements of the

business, the same habitual employment of a proportion of the equipment in each of the states served, the same character of service rendered, and the same adaptability to taxation on an average or proportionate basis. The power of the states over which the movement occurs to tax cannot be variously affected by dependence on whether the movement of the equipment happens to be through the air, on the ground, or over the waters. The Court below* agreed that the case of airplanes was indistinguishable from that of railroad cars, when it said:

> "We concede that the principle of the Pullman Car case is as applicable to planes as it is to railroad cars * * *."

The case here referred to is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

As further aligning this case with the rolling stock cases, the Court below also agreed that some proportion of petioner's airplanes had acquired a situs in other states and to that extent were taxable there, and that the power of each such state to tax was limited to the average number of planes within its borders during the tax period. But while limiting the power of other states to taxation on a proportionate basis, it conceded to Minnesota power to tax the fleet in its entirety. This is without precedent and would place the relative rights of the states upon a basis heretofore unheard of in the field of taxation.

While the Court expressly recognized that specific items of tangible personal property which had acquired a tax situs in another state could not be taxed by the state of the owner's domicile, it inconsistently held that *proportions* of such

*The words "Court below" are used for brevity in reference to the Supreme Court of Minnesota.

property which had acquired such other situs could still be taxed at the domicile. The decision may therefore be said to rest upon a supposed distinction between tangible personal property represented by specific items and tangible personal property represented by proportions. This is illogical and contrary to the rolling stock cases. The supposed distinction disregards the conception which permits taxation of different *proportions* of the same property by different states. Situs in such cases is based upon habitual use. Habitual use of a *proportion* is deemed for tax purposes the legal equivalent of permanent location of specific items equal in the aggregate to the given proportion. In either case the tax is upon *tangible* personal property. There is nothing else to tax. This is merely like saying that a tax upon an undivided interest in land is a tax upon real estate. A *proportion* is no more capable of having a permanent location or situs in two different states, and therefore of being taxable in both, than any individual item of the tangibles represented in the proportion. Hence the situs of a proportion of defendant's planes beyond the state (as found by the Court below) just as effectively removes that proportion from the State's jurisdiction as would a foreign situs of specific planes.

GROUNDS OF DECISION BELOW.

The grounds upon which the majority below thought the tax could be sustained are summarized in the paragraph of its opinion appearing on page 28 of the Record. This summary can perhaps be taken also as fairly representing the position of the State. The factors emphasized are: (1) that the Airlines was incorporated and had its principal place

of business in Minnesota; (2) that all of defendant's airplanes were at some time during the year in the State and major repairs were made there, and (3) that the Airlines shared in the benefits of the government and laws of the State.

DOMICILE AND MAIN OFFICE NOT CONTROLLING.

That the Airlines was chartered by Minnesota is not a controlling fact as to tangible property having a tax situs elsewhere. That the doctrine of *mobilia sequunter personam* is inoperative in such cases has come to be universally recognized. The personal property in question (proportion of planes habitually used outside Minnesota), as found by the Court below, had acquired a tax situs in other states. That excludes it from taxation by Minnesota. *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Frick v. Pennsylvania,* 268 U. S. 473.

In the *Union Refrigerator Transit Company* case (to which previous reference has been made), this Court condemned an attempt by Kentucky, the company's domicile, to tax its rolling stock employed in other states. The Court below thought this case distinguishable from the instant case on the narrow ground that in the *Transit Company* case some of the cars were never physically in Kentucky during the tax period, while in the present case it was found that, although only a part of the Airlines' fleet had been in Minnesota on May 1, 1939, the assessment valuation date, all of its planes had been in the State at times during the year. The decision in the *Transit Company* case does not rest upon any such narrow distinction,

and it becomes at least doubtful that the Court below correctly construed the language of the opinion when it is read in the light of the facts as they appear from the findings of the County Court of Kentucky, not questioned on appeal. The County Court determined:

> "* * * that the transit company was the owner of two thousand cars in September, 1897, 1898, 1899, and 1900 * * * ; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list *such a proportion** of its cars as *under a system of averages* upon their gross earnings were shown to be used in the state of Kentucky during the fiscal year, the court finding *by this method* that there were subject to assessment in Kentucky twenty-eight cars for the year 1897, twenty-nine for the year 1898, forty for the year 1899, and sixty-seven for the year 1900." (p. 195 of 199 U. S.).

This finding obviously does not refer to any particular twenty-eight, twenty-nine, forty, or sixty-seven cars, but to the *average number* of cars in the state during the respective years in question. The ratio may render it improbable that each of the two thousand cars was at any time in the state during any year, but that is not impossible. If the Court considered the point of any decisive significance, some comment might have been expected upon it. When the Court referred to the property involved as being "permanently located in other states and employed there," it may well have referred to the *proportion* of the company's cars so located and used rather than to specific cars. It is hardly conceivable that the decision of this Court would have been different had it affirmatively appeared that all of

*All italics appearing in quotations herein are supplied for the purpose of emphasis.

the Transit Company's cars had at some time during the year been temporarily in Kentucky.

That the location in Minnesota of the Airlines' main business office and hangar for major repair work is not of controlling significance is determined by the decision in *Johnson Oil Refining Co. v. Oklahoma,* 290 U. S. 158. The Refining Company used its own fleet of tank cars for the shipment of its products into various states. After making deliveries the cars returned to the refinery, where they were repaired as needed, refilled, and reshipped or held for later use. The refinery was definitely the operational headquarters of the company. Yet a tax by Oklahoma on the entire fleet of cars was held invalid, the Court saying:

> "The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other states."*

The corporate domicile and business headquarters of the Airlines could at most draw the property in question to the jurisdiction of Minnesota for taxation only if that property had no tax situs elsewhere. It did have a tax situs elsewhere. With this the Court below agreed.

The significance of the date May 1 referred to in the stipulation, findings, and decision arises from a statutory provision which reads:

> "Personal property shall be listed and assessed annually with reference to its value on May 1, and if acquired on that day shall be listed by or for the per-

*That the decision in the Johnson Oil Refining Company case may have a significance beyond that attributed to it by the majority below appears to be conceded by the observation respecting it (26):

> "Broad language was used by the Court in its opinion and, as ably shown by the dissenting opinion of Mr. Justice Loring, it is reasonably susceptible of more than one interpretation."

son acquiring it." (Section 273.01, Minnesota Statutes, 1941; Section 1984, Mason's Minnesota Statutes, 1927).

On May 1, 1939, only a part of the Airlines' fleet of airplanes was in the State of Minnesota at any time during the day, and of the fifteen planes that were in the State on that day only eight were in the State during the entire day (8, 12-13).

In its brief in opposition to the petition for certiorari, the State suggests (p. 3):

> "And for all that appears, all of said fleet was in Minnesota on May 1, 1939, the assessment date."

It was stipulated and found that:

> "On May 1, 1939, there were present in the State of Minnesota for at least a part of the day the following listed airplanes belonging to the defendant and *constituting a part of its entire fleet* * * *." (8, 12-13)

This is the only reference in the record to the matter and leaves it clear that on May 1, 1939, there was in Minnesota a part only of the petitioner's fleet of planes.

TAX NOT JUSTIFIED ON THEORY OF "EQUIVALENT" OF PROTECTION.

The authority to tax is also predicated upon supposed governmental protection given in return by the State of Minnesota. One of the authorities cited in support of this theory is *Union Transit Company v. Kentucky*, 199 U. S. 194, in which the Court said:

> "The power of taxation * * * is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his property * * *."

The equivalence here spoken of does not require that the benefits of government be appraised in dollars and cents and balanced against the tax. It does, however, require at least a theoretical "equivalent" having some minimum limit. Also the protection and benefits must be with respect to the particular property in question rather than to the taxpayer generally. Defendant's franchise to exist as a corporation under the laws of Minnesota and the privilege of exercising corporate management and business direction in that state is obviously not such a benefit in relation to the corporation's tangible property located elsewhere as to authorize the taxation of that property. *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Frick v. Pennsylvania,* 268 U. S. 473. It can always be said in a sense that the government and laws of a corporation's domicile upon which it depends for its existence are a benefit and protection to the business and property of the corporation, wherever located. This is not the kind of benefit and protection spoken of by the courts. The benefits must have a more direct relation to the property. The impossibility of an "equivalent" in the present case seems self-evident. The majority opinion below recognizes the right of other states to tax a *proportion* of defendant's planes on the assumption, presumably, that those states give in return an equivalent of protection. Such an assumption precludes justification of a like tax by the State of Minnesota upon the same property on the theory of another equivalence of protection. If such a claim be sustained, then a dozen or more states traversed by an air route might with equal show of right impose a full tax upon the air transport company's entire

fleet of planes upon the pretext of an equivalent of protection. The havoc which might be wrought upon this industry by such a doctrine can readily be seen.

The Court below was right in recognizing the authority of other states to tax on an average basis the proportion of the property employed in those states and receiving from them essentially the same character of benefit and protection as afforded by Minnesota in respect of the proportion there, but was wrong in the view that the like benefit and protection afforded by the latter state gave it a superior right.

DECISIONS CONCERNING TAXATION OF INTANGIBLE PROPERTY CONTRASTED WITH THOSE DEALING WITH THE TAXATION OF TANGIBLE PROPERTY.

It is apparent that the view of the majority below was decisively influenced by the supposed implications of certain opinions of this Court written in cases involving the taxation of intangibles only, including particularly *State Tax Commissioner v. Aldrich*, 316 U. S. 174, *Curry v. McCanless*, 307 U. S. 357, and *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435. The *Aldrich* and *McCanless* cases are apparently construed as erasing all distinction between tangible and intangible personal property as respects multiple tax situses and liability to tax in more than one state. "*Property*", the Court said, "may have a situs in more than one state. * * *" The *Aldrich* and *McCanless* cases have no such broad implication. They were concerned with transfer taxes upon intangibles, and jurisdiction to tax was discussed only in terms of intangibles and of the nature

and characteristics of that class of property. There was a careful avoidance of indiscriminate reference to personal property generally or the inclusion of tangibles with intangibles. In the *Aldrich* case, as the Court below observed, *First National Bank v. Maine,* 284 U. S. 312, was overruled, and *Blackstone v. Miller,* 188 U. S. 189, was reinstated. But again both of these cases dealt only with succession taxes on intangibles. It is important to note that there has been no overruling of *Frick v. Pennsylvania,* 268 U. S. 473, or of *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341, or of the decisions in the rolling stock cases. These are the cases that established the rule with reference to the taxation of tangibles. In the *Frick* case, this Court held Pennsylvania to be without power to impose a tax on transfer by death of a Pennsylvania resident in respect of tangible personal property located elsewhere. The State urged as authority for the tax *Blackstone v. Miller* and a subsequent case. The comment of this Court was:

> "Both cases related to intangible personalty, which has been regarded as on a different footing from tangible personalty. When they are read with this distinction in mind, * * * it is apparent that they do not support the tax in question."

The same distinction is implicit in *Curry v. McCanless,* 307 U. S. 357, involving inheritance and succession taxes upon intangible property in which the opinion spoke of the "cleavage between the rules of law applicable to tangibles and those relating to intangibles", and said:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located * * * for purposes

> of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

And later added:

> "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things."

For another decision drawing the same distinction, see *Blodgett v. Silberman*, 277 U. S. 1. In *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 209, it was said:

> "When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception."

It is noteworthy that all of the decisions cited in the *Aldrich* case as supporting that decision and as condemning *First National Bank v. Maine* (with one exception not here significant) are decisions involving the taxation of intangible property. There is nothing in these cases marking a departure from the established rule that tangible personal property can have but one situs, and therefore can be but once taxed.

II.

The Tax Is in Violation of the Commerce Clause.

Ordinary property taxation imposed on tangible property employed in interstate commerce does not amount to an unconstitutional burden on that commerce, so that the mere fact that the Airlines' planes are flown in interstate commerce does not wholly remove them from state taxation. In general it has been said also that double taxation is not forbidden by the Constitution. However, there appears to be no decision of this Court directly on the question of whether double or multiple taxation of the tangible instruments of interstate commerce is permitted by the commerce clause. The principle established by other cases condemns such taxation and therefore condemns the imposition by the State of Minnesota of a full ad valorem tax upon the Airlines' planes which are taxable and are being taxed on a proportionate basis by other states by virtue of their use therein as an incident of interstate commerce.

Explaining the basis of unconstitutionality of taxes measured by gross receipts from interstate business, this Court, in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 255, said:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature *as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause *it would bear cumulative burdens not imposed on local commerce.*"

In *Adams Manufacturing Company v. Storen*, 304 U. S. 307, 311, this Court said with respect to a gross income tax:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce • • •. Interstate commerce would thus be subjected to the risk of a *double tax burden* to which intrastate commerce is not exposed, and which the commerce clause forbids."

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439-40, this Court said of a similar tax of the State of Washington:

> "If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, *the risk of a multiple burden to which local commerce is not exposed.*"

In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 45, it was said of cases condemning taxes under the commerce clause that:

> "The decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage."

And again:

> "License taxes requiring a corporation engaged in interstate commerce to pay a fee of a certain percentage of its capital stock have been rejected *because of the danger that each state in which the corporation does business may impose a similar tax* measured by its interstate business in all, * * * and have only been sustained *when apportioned* to that part of the capital thought to be attributable to an intrastate activity."

And further that:

> "Privilege taxes requiring a percentage of the gross receipts from interstate transportation or from other activities in carrying on the movement of that commerce, which, if sustained, *could be imposed wherever the interstate activity occurs,* have been struck down for similar reasons."

In *Western Live Stock v. Bureau of Revenue,* supra, the method of taxation upheld in that case was described as:

> "A practical way of laying upon the commerce its share of the local burden *without subjecting it to multiple taxation not borne by local commerce* and to which it would be subject if gross receipts *unapportioned* could be made the measure of a tax laid in every state where the commerce was carried on."

In *Coverdale v. Pipe Line Co.,* 303 U. S. 604, 612, the Court recited as one of the characteristics giving validity to the tax there under consideration:

> "The tax *is without discrimination* in form or application as between inter- and intra-state commerce, *and it cannot be imposed by more than one* state."

The present tax has inherently the vice which condemned other forms of taxation, as indicated by the foregoing excerpts quoted from the opinions of this Court. The property here taxed is not only capable of being taxed with equal right by every other state through which the airplanes move in the course of interstate commerce, but are there actually being taxed. As a result of Minnesota's insistence upon a full ad valorem tax, the property is being made to bear a cumulative multiple burden not imposed on intrastate commerce or similar property used in such commerce. There is therefore a clear discrimination against interstate as compared with intrastate commerce. Incidentally, it is, of course, only because of its need for interstate commerce use that the Airlines owns and operates the large fleet of planes which are the object of the tax. For any possible intrastate business there would be need of very few.

From every practical point of view the same objections to an unapportioned tax on the proceeds of interstate commerce apply to the present tax. An unapportioned tax on the instruments of that commerce capable of being taxed in many states offers comparable possibilities of burden on and interference with such commerce.

In the majority opinion below the commerce clause was waved aside with the comment:

> "Property engaged in the transportation of interstate commerce may be subjected by a state to the usual nondiscriminatory property taxes if jurisdiction to tax otherwise exists." (Citing *Pullman Palace Car Company* and *Johnson Oil Refining Company* cases.) (30)

The two cases cited give approval only of taxes based on the average or proportionate basis, and the opinions give no indication of a view that multiple taxation of property employed in interstate commerce is permitted by the commerce clause. The natural inference is to the contrary.

III.

The Steamship Cases Are Not Analogous.

The State has urged that the guide to a proper determination of this case is to be found in certain decisions of this court in cases involving the taxation of steamships and other water craft. The leading case in this group is *Hayes v. Pacific Mail Steamship Company,* 17 How. (U. S.) 596. The last case in the series is *Southern Pacific Co. v. Kentucky,* 222 U. S. 63.

Various nondomiciliary states attempted to tax ships, claiming situs by virtue of visits of the ships at the ports of the taxing states. There was no question of apportionment, the port states assuming the right to tax the full value of individual vessels. The right of these states to so tax was denied generally upon the view that the visits of the vessels at the ports in question were too short, irregular, or uncertain to furnish sufficient basis for a tax situs superseding the domiciliary situs. The decisions were largely influenced by certain general concepts of the nature of water navigation and (especially in the earlier cases) the effect of the registration and enrollment required by Federal maritime statutes and the resulting significance of the so-called "home port" and its relation to the owner's domicile.

In the leading case of *Hayes v. Pacific Mail Steamship Company,* the court stressed the fact that the vessels in question (which were plying between New York, San Francisco, and Portland) were engaged in "navigating the waters of the ocean" and "were engaged in the commerce of the country upon the highway of the nations." It was said that the particular vessel in question was within the jurisdiction of any of the states visited only temporarily "and for a purpose wholly excluding the idea of permanently abiding in the state." How there could be any tax by the port states on a proportionate basis is difficult to see. On any basis of route mileage or ship mileage or under any permissible formula which could be suggested, any tax to which California would be entitled would be wholly insignificant.

Morgan v. Parham, 16 Wall (U. S.) 471, emphasizes the same considerations. A vessel owned and registered in New York was plying between Mobile and New Orleans, and was held not taxable in Alabama upon the ground, among others, that

> "* * * the vessel was lawfully engaged in interstate trade over the public waters. It is in law as if the vessel had never before or after that day been within the port of Mobile, but touching there on a single occasion when engaged in the interstate trade, had been subjected to a tax as personal property of that city."

That even in the case of ships the situs of domicile and port of enrollment must yield to permanent physical situs arising from habitual use and employment is established by *Old Dominion Steamship Co. v. Virginia,* 198 U. S. 299. Certain ships owned by a Delaware corporation which were

registered and enrolled in that state were used on the inland waters of Virginia, connecting with larger ocean-going vessels operating from the connecting points to destinations outside the state. This gave the operation of the vessels in question the character of interstate commerce. They were held taxable in Virginia as against the contention that only Delaware could tax. Suppose these ships instead of being employed solely in Virginia had in a similar manner been operated in both Virginia and North Carolina. Could there, under this decision, be any escape from the necessity of an apportionment between those two states? Apparently not.

In *Ayer & Lord Co. v. Kentucky,* 202 U. S. 409, the state of domicile and state of registry were rivals for authority to tax certain vessels. The decision was for the state of domicile. The Court, after reviewing the history of Federal legislation concerning the registry and enrollment of vessels, said:

> "The general rule has long been settled, as to vessels plying between the ports of different states engaged in the coast-wise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, * * * subject, however, to the exception that where a vessel engaged in interstate commerce *has acquired an actual situs* in a state other than the place of domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

The opinion in the case of *Southern Pacific Co. v. Kentucky,* 222 U. S. 63, reviewed the previous cases and held that vessels engaged in coast-wise shipping were subject to taxation at the domicile of the owner "since that is the

situs assigned to tangibles *where an actual situs has not been acquired elsewhere.* Some of the considerations moving the Court appear from the following observations:

> "To lay down a principle that vessel property has no situs for purposes of taxation other than the actual permanent location would introduce elements of uncertainty concerning the situs of such property *not presented by other kinds of movable property*
>
> "* * * A ship is not intended to stay in port but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty *as to result often in an entire escape from taxation.*"

A solution for the problem of taxation of airplanes engaged in interstate operations is not to be found in the steamship cases and the Court below correctly concluded that the true analogy is furnished by railroad rolling stock cases.

CONCLUSION.

This case is one of grave concern not only to the petitioner but to the entire air transport industry, and in fact to all state governments and to the general public. To the Airlines the Minnesota tax carries a threat of multiple taxation of its aircraft which may become a burden of the most serious proportions. Indeed, should the tax be sustained, the Airlines will immediately be subject to multiple taxation of its airplanes. The gravity of the issue to the general industry is enhanced by the facts, first, that

air transportation is essentially interstate in character, more predominantly so than even the railroads, and, second, that airplanes are highly expensive equipment and represent a very large portion of the capital investment of all operating companies, and are subject to relatively rapid depreciation. These factors peculiarly expose flying equipment to the menace of multiple taxation and aggravate the severity of the burden of such taxation.

All of the states served by interstate airlines are concerned in obtaining an equitable share of the revenues to be derived from the legitimate taxation of the aircraft coming within their proper jurisdictions. The only basis on which a just and equitable allocation of those revenues can be accomplished is that of apportionment according to the rule of the rolling stock cases. Without the restraining effect of that rule will come conflict and confusion and unfortunate rivalry for advantage between the states.

That it is important to the national economy that the air transport industry shall continue to enjoy a normal, unhampered development needs no emphasis. That an inordinately onerous system of taxation may adversely affect the course of that development is not open to question.

The interests of all concerned would be promoted by the fair, orderly, and nondiscriminatory exercise of the taxing privilege that would be assured by the enforcement of the doctrine of apportionment. The legal justification—in fact the constitutional necessity—for giving effect to that doctrine has been made to appear. Fortunately it happens that sound constitutional principles, public policy, and the interests of the industry all coincide in respect to

the solution of the problem by which they would best be served.

M. J. DOHERTY,
W. E. RUMBLE,
Saint Paul, Minnesota,
Attorneys for Petitioner.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Saint Paul, Minnesota,
Of Counsel.